No. 499

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

THE EMIGRANT INDUSTRIAL SAVINGS BANK,
Plaintiff-Respondent,

against

EMIL J. SONDERLICK,
Defendant-Petitioner,

CATHERINE M. TERRIAULT, *et al.*,
Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT AND BRIEF IN SUPPORT THEREOF.

EMIL J. SONDERLICK,
Petitioner.

by JACOB W. FRIEDMAN,
Attorney for Petitioner.

MARK SERVICE, BARCLAY 7-2180

SUBJECT INDEX.

Cases Cited.

Statutes Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

THE EMIGRANT INDUSTRIAL SAVINGS BANK,
Plaintiff-Respondent,

against

EMIL J. SONDERLICK,
Defendant-Petitioner,

CATHERINE M. TERRIAULT, *et al.*,
Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT.

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner Emil J. Sonderlick respectfully prays for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department (the highest court in the State of New York in which a determination could be had herein), to review a judgment of that Court entered on February 21, 1944, affirming a judgment of foreclosure and sale of real estate in favor of the respondent Bank entered on an order summarily striking out the amended answer of the petitioner.

On March 20, 1944, the said Appellate Division denied petitioner permission to appeal to the Court of Appeals

of the State of New York, and the Court of Appeals likewise denied such permission on May 25, 1944, so that a determination could not be obtained in any state court higher than said Appellate Division. On August 25, 1944, Mr. Justice Jackson signed an order extending to and including September 25, 1944, the time of petitioner within which to file his petition for certiorari.

Statement of Matters Involved.

On February 27, 1942, respondent Bank commenced this action to foreclose the first mortgage on petitioner's real property located at 8716 Britton Avenue in Elmhurst, Borough of Queens, City and State of New York, by the service of a summons and complaint on one of the defendants named in the action (92-93). The action allegedly was brought for defaults in the payment of interest and taxes (92).

On or about February 28, 1942, the respondent Bank obtained the extension of an illegal and void receivership to its foreclosure action (244).

On February 11, 1943, petitioner was served with the supplemental summons and amended complaint in this action (99-102). He duly interposed his amended answer on April 8, 1943 (107). His amended answer (190-202) contained several denials and two defenses. The first defense, alleging that the respondent Bank had instituted a prior action to foreclose the same first mortgage on or about March 1, 1941 (194-195), was withdrawn by stipulation on June 14, 1943 (335-339).

The second defense alleged that petitioner became the sole owner in fee simple of the said real property by virtue of a deed which was duly recorded in the office of the Register of Queens County on September 9, 1939; that on or about January 16, 1941, all the outstanding property taxes on the said property and the mortgage interest

due the respondent were duly paid up; that on or about January 16, 1941, petitioner was wrongfully deprived of the possession of his said real property and of the rents and profits thereof under the guise of an utterly wrongful, illegal and void receivership purportedly obtained in an action in the Queens County Supreme Court entitled "*Juanita Gelly, Plaintiff, against Anna Kalamon, Joseph Kalamon and Theodore A. Dylewski, Defendants*"; that thereafter the respondent had knowledge and was aware that petitioner was wrongfully deprived of his possession of the said real property and of the rents and profits thereof by the said Hallinan and that the so-called receivership in the *Gelly* v. *Kalamon* action was wrongful, illegal and void; that thereafter the respondent knowingly accepted and retained divers sums of money from the said Hallinan purportedly in payment of the mortgage interest; that thereafter the respondent had knowledge and was aware that the said Hallinan had neglected and failed to keep the said real property in reasonably good repair; that thereafter the said Hallinan intentionally and wrongfully neglected and failed to continue to pay the mortgage interest and the property taxes on the said real property; that on or about March 1, 1942, respondent commenced this foreclosure action and obtained the extension of the so-called receivership in the *Gelly* v. *Kalamon* action to this foreclosure action; that the respondent commenced this action and obtained the extension of the so-called receivership to this action in a wrongful endeavor to abet and allow the said Hallinan to escape from the wrongful, illegal and void receivership in the *Gelly* v. *Kalamon* action (195-202).

Respondent made a motion (77-89) for "judgment for the relief demanded in the amended Complaint and for an Order striking out the Answer of the Defendant, Emil J. Sonderlick, under Rule 113 of the Rules of Civil Practice on the ground that there is no defense to the action * * *" (85).

In support of its motion, respondent submitted the affidavit of James A. Finn, a vice-president of the respondent Bank (136-148), and the affidavit of Joseph C. Wolf, one of its attorneys (90-134).

The Finn affidavit set forth no facts or evidence to rebut the second defense in petitioner's amended answer (210). Finn's affidavit merely stated (146-147):

> "Upon information and belief the Plaintiff had no knowledge as to whether or not the Receivership was void or illegal and further that the Plaintiff commenced this action solely by reason of the defaults hereinabove set forth and solely for the purpose of protecting its interest in the mortgaged premises."

and that (147):

> "Your deponent has been advised by the Attorney for the Plaintiff Bank that the Amended Answer interposed in this action by Emil J. Sonderlick, verified the 6th day of April, 1943, is without merit and that there is no defense to said foreclosure action and that said Answer has been interposed merely for the purpose of delay and your deponent verily believes this to be true."

The Wolf affidavit likewise set forth no facts or evidence to rebut the second defense. It merely referred to the aforementioned unsubstantiated averments in the Finn affidavit but omitted to state that the Finn averments were made only upon information and belief (122-128). The Wolf affidavit does set forth the following untenable argument (125-126):

> "* * * Furthermore, assuming for the purpose of argument that the receivership was illegal it was not incumbent upon the Plaintiff herein to determine the

legality or illegality of the receivership. The Plaintiff had the right to foreclose its mortgage and had the right to have a receiver appointed for its benefit. At the time of the commencement of the action, the premises were in the possession of a receiver duly appointed by an order of the Court. Under Rule 179 of the Rules of Civil Practice and under the decisions construing that section the Plaintiff was obliged to have the receivership extended for its benefit. It could not have a new receiver appointed. Therefore, insofar as the Plaintiff is concerned, whether or not the receiver in possession was rightfully or wrongfully is immaterial."

Nowhere in the two moving affidavits was there even a denial of the allegations of the second defenses that the respondent had commenced this foreclosure action and obtained the extension of the illegal receivership to this action in a wrongful endeavor to abet and allow the said Hallinan to escape from the wrongful, illegal and void receivership in the *Gelly* v. *Kalamon* action (223-224). Nor do the moving affidavits set forth any grounds exempting the respondent Bank from the "clean hands" doctrine in this foreclosure action (224).

After setting forth the reasons why the respondent was not entitled to a summary judgment on its moving affidavits (205-225), petitioner showed by facts and documentary evidence and admissions that his second defense was a bona fide defense and sufficient to defeat respondent's foreclosure action (225-306).

The so-called receivership in the *Gelly* v. *Kalamon* action was illegal and void because:

1. On the date of the appointment of Hallinan as receiver, petitioner was the record and sole owner in fee simple of the said real property (226, 228).

2. The appointment of the so-called receiver was made without notice to petitioner as the owner of the said real property (228).

3. Petitioner never was a party in the *Gelly* v. *Kalamon* action (229).

4. Petitioner's real property was not even the subject matter of the *Gelly* v. *Kalamon* action and was so adjudicated by the Queens County Supreme Court in its order of October 2, 1939, vacating the *lis pendens* that was filed in the *Gelly* v. *Kalamon* action (229, 259-264).

5. The appointment of the so-called receiver was in complete violation of section 121 of the New York Civil Practice Act which specifically provides (230):

> "* * * After a notice of pendency of action has been cancelled, neither the proceedings in the action nor any judgment which may be rendered therein shall affect the real property described in any such cancelled notice."

6. The resettled judgment in the *Gelly* v. *Kalamon* action which was entered on December 15, 1939, made no mention of petitioner, and can have no bearing upon his rights to the ownership of the said real property, both by virtue of its own terms and by virtue of the order vacating the *lis pendens*, and can be attacked collaterally because it is founded on a complaint which is insufficient on its face for the wholly independent reason, among others, that it does not comply with the New York Real Property Law, section 442-d (231).

Altho petitioner informed the respondent's president on several occasions (296-301, 302-306) that respondent's representatives had connived to extricate Hallinan from the void Gelly v. Kalamon receivership, not once did the respondent deny petitioner's charges of collusion and

connivance between its representatives and Hallinan (249-256). Nor has it renounced the acts and omissions of its representatives. Instead, it has ratified and approved of said acts and omissions (255-256).

The extent of the "co-operation" to "receiver" Hallinan may be gauged by the fact that "The bank, however, did not object to the receiver balancing his account with moneys collected after February 28, 1942, to wit: the March rents of $218 * * *. Had the bank insisted upon the receiver accounting to it for the full March rents, plaintiff (Gelly) may have had to make up a deficiency of $120.58." The quotation last mentioned is from a decision in the *Gelly* v. *Kalamon* action (248-249).

In a letter of December 10, 1942, some time prior to the service of process upon petitioner, the respondent's president made the following admission against interest (307-311):

> "We will not settle and discontinue the present action unless all claims arising out of, or in any way connected with, such action are waived by you through the execution of a proper release."

Wolf's reply affidavit (311-330) raised additional issues of fact that should have been remitted to trial for determination and improperly were summarily decided upon the affidavits.

Question Presented.

Was the summary dismissal without a trial of petitioner's amended answer, which dismissal was predicated on affidavits failing to rebut petitioner's defenses of the invalidity of the receivership and of respondent's collusive conduct and whereby petitioner was deprived of his property without a trial, due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States of America?

Reasons for Allowance of Writ.

1. Petitioner, through the decision of the Court below, has been deprived of valuable real property, his title thereto has been ignored and he has been denied the opportunity of ousting those wrongfully in possession of his property.

2. His title to this property has been nullified on the basis of an alleged prior adjudication in an action to which he was not a party, and in disregard of the plain provisions of New York Civil Practice Act, section 121.

3. He has been ousted of his possession through the medium and extension of a void receivership granted without notice to him as owner of the said real property.

4. He has been deprived of a trial on the merits.

5. All of the foregoing proceedings are grossly violative of his rights under the Fourteenth Amendment of the Constitution.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the Appellate Division of the Supreme Court of the State of New York, Second Department, commanding said Court to certify and send to this Supreme Court, on a day to be designated, a full and complete transcript of the record and all proceeds of the said Appellate Division had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the said Appellate Division be reversed, and that petitioner be granted such other, further and different relief as may be just and proper.

Dated, New York, N. Y., September 22, 1944.

EMIL J. SONDERLICK,
Petitioner,

by JACOB W. FRIEDMAN,
Counsel for Petitioner.